

HEALTH LAW

CASES, MATERIALS AND PROBLEMS

Sixth Edition

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*To Donna Jo, Elena, Michael, Nicholas, Eva,
Robert and Hayden*

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To Bob, Emily, Kathleen, Colin, Nicholas and Zachary

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T.S.J.

To Jane, Mirra and Elana

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This book is also dedicated to the memory of Nancy Rhoden and
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warm friends.

*

Preface

This sixth edition of this casebook marks the twentieth anniversary edition of our text, first published in 1987. Since that first edition, no part of the American landscape has changed more than the American health care system. The system has been stressed by demographic changes, buffeted by the winds of political change, and utterly transformed by social and economic developments. The formal structure of the business of health care was a small part of the subject of health law when we published our first edition; it is now the subject of entire graduate programs. The for-profit commercial sector of the health care economy sounded like a lamb twenty years ago; now it roars like a lion. Until a few years ago virtually no one attained elective office because of her position on issues related to health care; now opinion polls peg it as one of the most important issues in the 2008 election. Economic and political fortunes have been made (and lost) predicting the reactions of Americans to changes in our system for delivering health care. While the perspective that we must bring to the legal analysis of health care is far broader now than it was twenty years ago, the fundamental concerns on which that analysis is brought to bear are surprisingly unchanged. As was the case in 1987, we want to know what role the law might play in promoting the quality of health care, in organizing the delivery of health care, in assuring adequate control of the cost of health care, in promoting access to necessary health care, and in protecting the human rights of those who are provided care within the health care system.

The sixth edition of this casebook continues to use the broad organization that health law teachers and students found so helpful in the last five editions. As was the case in previous editions, we employ materials from a variety of sources. This book continues to contain the most significant and useful judicial opinions dealing with the issues of health law, drawn from the federal and state courts. The book also contains statutes, legislative history, administrative regulations, excerpts from contracts, consent forms, and a host of other kinds of materials designed to bring the subject of health law to life in the classroom. It also contains many classroom-tested problems that should be helpful in encouraging reflections on these materials. While many of the problems and other materials have been brought forward from earlier editions of this book, every section of this casebook has been rewritten and the organization of the text reflects new developments in American health care. All cases, statutes, regulations, and other materials in the casebook have been edited to enhance their teaching value while assuring that they reflect problems faced by health lawyers coping with the health system in 2008 and beyond. The notes expose students to a range of the most subtle health law inquiries under discussion at the time of publication.

This casebook is divided into an introduction and four major sections. Chapter 1, the introduction, provides some benchmarks against which we can measure other developments in health care. It addresses how we define illness and health, how we assess quality within the health care system including how we address medical error, how we establish the foundation for good health and the prevention of disease, and how we might fairly distribute health care within our society. The next five chapters (chapters 2 through 6) address ways in which the law can contribute to the promotion of the quality of health care. This part

of the casebook includes thorough treatment of governmental efforts to assure the quality of health care services, including the interaction between public and private quality initiatives, as well as extensive analysis of medical malpractice law.

The second part of the text (chapters 7 through 11) addresses the issues of access to health care and control of health care costs. These chapters address both private and public financing mechanisms in the many varieties that have been formed and reformed over the past few years, including the Medicare and Medicaid and private health insurance. The continued evolution of managed care is examined, as is the emergence of the consumer-driven health care movement. This material also addresses legal obligations to provide medical services, and examines legal and policy issues raised by health care disparities.

The third part of the book (chapters 12 through 15) describes the role of the law in organizing the health care enterprise. This section of the casebook includes materials on different ways in which the business of health care delivery can be organized, materials describing the legal relationships among different players in the health care enterprise, including a chapter on tax and corporate law and another on health care fraud and government regulations of financial relationships among providers, and a clear, simple account of the application of antitrust law to health care.

Finally, the fourth major section of the text, (chapters 16 through 20) provides students with background on the role law plays in protecting the human rights of those who interact with the health care system as patients or as participants in medical research. This section of the casebook addresses the current status of laws regulating abortion, assisted conception, and human reproduction. Material on genetics focuses on legal and public policy issues relating to privacy, confidentiality, and discrimination triggered by developments in genetics and genetic medicine. This section of the casebook provides extensive discussions of the controversies over the definition of death and the law relating to making life and death decisions (including physician assisted death). The casebook concludes with a review of legal regulation of research involving human subjects. Updated and expanded materials on issues of race and health have been included throughout this text. All of these materials have been reviewed to assure that a wide range of perspectives leaven the authors' analysis of health law.

This casebook is designed to be a teachable book. We are grateful for the many comments and helpful suggestions that health law teachers across the United States (and from elsewhere, too) have made to help us improve this new edition. We attempt to present all sides of policy issues, not to evangelize for any political, economic or social agenda of our own. This task is made easier, undoubtedly, by the diverse views on virtually all policy issues that the several different authors of this casebook bring to this endeavor. A large number of very well respected health law teachers have contributed a great deal to this and previous editions by making suggestions, reviewing problems, or encouraging our more thorough investigation of a wide range of health law subjects. We are especially grateful to Charles Baron, Eugene Basanta, David Bennahum, Robert Berenson, Kathleen Boozang, Arnold Celnicker, Don Chalmers, Ellen Wright Clayton, Judith Daar, Dena Davis, Arthur Derse, Kelly Dineen, Ileana Dominguez-Urban, Stewart Duban, Margaret Farrell, David Frankford, Michael Gerhart, Joan McIver Gibson, Susan Goldberg, Jesse Goldner, Andrew Grubb, Art LaFrance, Diane Hoffmann, Jill Horwitz, Amy Jaeger, Eleanor Kinney, Thomasine Kushner, Pam Lambert, Theodore LeBlang, Antoinette Sedillo Lopez, Lawrence Singer, Joan Krause, Leslie Mansfield, Thomas Mayo,

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It has been a splendid opportunity to work on this casebook, and we are especially pleased to have reached its twentieth anniversary. It has been a constant challenge to find a way to teach cutting edge issues influencing our health care system—at times before the courts or legislatures have given us much legal material for our casebook. Each time we have done a new edition, there have been developments that we find difficult to assess as to whether they will become more significant during the lifespan of the edition or are simply blips. It is always difficult to delete materials that required much labor and still remain quite relevant but that have been eclipsed in importance by others, and the length of each succeeding edition attests to our challenge. Finally, we do not write this casebook for our classes alone, but rather for yours as well. We enjoy teaching, and we hope that comes through to the students and teachers who use this book.

A note on editorial style: Elipses in the text of the quoted material indicate an omission of material within the quoted paragraph. Centered elipses indicate the omission of a paragraph or more; the first line following centered elipses may not be the first line of the next paragraph, and the last line preceding centered elipses may not be the last line of the preceding paragraph. Brackets indicate the omission of a citation without the omission of other materials. There is no acknowledgment of omitted footnotes. To the extent it is possible, the style of this casebook is consistent with the principle that legal writing form should follow function, and the function of this text is to help students understand health law.

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